Takang Timber Sdn Bhd v Government of Sarawak & Anor

HIGH COURT (MIRI) — SUIT NO MR 26 OF 1990
ELIZABETH CHAPMAN JC
24 JUNE 1998

Civil Procedure *— Parties — Intervention — Third party claimed against defamatory remarks made by judge in judgment — Judgment had been given and perfected — No claim against any of the parties to the suit — Whether such claim sustainable — Rules of the High Court 1980 O 15 r 6(2) & (3)*

The applicant applied by summons in chambers for leave to intervene and/or to be added as a plaintiff to this suit pursuant to O 15 r 6(2) and (3) of the Rules of the High Court 1980. Judgment for the suit had been given and the final order had been perfected and extracted. The applicant submitted four grounds to intervene, inter alia, the judgment of the suit contained remarks, accusation and/or innuendoes defamatory to the applicant as a person and a professional lawyer, the remarks were not justified and that the applicant was directly interested and/or affected by the judgment as a person and a professional lawyer and the intervention was necessary for the applicant to seek redress and restitution.

Held, dismissing the application:

Under O 15 r 6(2), an order under this rule can only be made before judgment. There did not exist any question or issue arising out of or relating to or connected with any relief or remedy claimed in the suit which remained to be determined between the applicant and the defendants (see p 45F).

Moreover, there was no claim by the applicant for relief against any of the parties to the suit; he had not shown how his rights against or liabilities to any party in the action in respect of the subject matter of the action be directly affected by the judgment. Furthermore, he was not affected or interested in a personal or professional capacity in respect of the subject matter of the action (see pp 45I and 46A–B).

Also, it is settled law that one High Court cannot set aside a final order of another High Court (see p 46E). In this case, the applicant's real grievance was against the judgment itself and not against any of the parties. The court has judicial immunity which must be respected and if the applicant's claim was for damages for defamation, obviously it was not only unsustainable but such a claim could not be made by intervening in the suit wherein the court and/or the learned trial judge was not even a party to the action. Further, such a claim would be unsustainable because of the immunity conferred on the learned judge by s 14(1) of the Courts of Judicature Act 1964 (see pp 46I and 47A).

A [**Bahasa Malaysia summary**

Pemohon memohon melalui saman dalam kamar untuk kebenaran mencelah dan/atau untuk ditambah sebagai plaintif di dalam tindakan ini menurut A 15 k 6(2) dan (3) Kaedah-Kaedah Mahkamah Tinggi 1980. Penghakiman untuk tindakan telah diberikan dan perintah
B muktamad telah disempurnakan dan diambil. Pemohon memberikan empat alasan untuk mencelah, antara lain, penghakiman tindakan itu mengandungi teguran, tuduhan dan/atau sindiran yang memfitnah pemohon sebagai seorang individu dan seorang peguam profesional, teguran itu tidak mempunyai alasan yang kuat dan bahawa pemohon
C itu adalah secara langsung berminat dan/atau dijejaskan oleh penghakiman itu sebagai seorang individu dan seorang peguam profesional dan pencelahan itu adalah perlu bagi pemohon mencari tebus rugi dan restitusi.

D **Diputuskan**, menolak permohonan:
Di bawah A 15 k 6(2), satu perintah di bawah kaedah ini hanya boleh dibuat sebelum penghakiman. Tidak terdapat apa-apa soalan atau isu yang timbul daripada atau bersangkut kepada atau berhubung dengan apa-apa relief atau remedi yang dituntut di dalam tindakan itu yang masih perlu ditentukan di antara pemohon dan defendan-
E defendan (lihat ms 45F).

Tambahan pula, tidak ada tuntutan oleh pemohon untuk relif terhadap mana-mana parti kepada tindakan itu; dia tidak menunjukkan bagaimana haknya terhadap atau liabiliti kepada mana-mana parti di dalam tindakan itu berkaitan dengan isi perkara tindakan
F itu dan dengan secara langsung dijejaskan oleh penghakiman itu. Selanjutnya, dia tidak dijejaskan atau berminat dalam keupayaan sebagai seorang individu atau secara profesional berhubung dengan isi perkara tindakan itu (lihat ms 45I dan 46A–B).

Juga, ia merupakan undang-undang mantap bahawa sesebuah Mahkamah Tinggi tidak boleh mengetepikan perintah muktamad
G oleh Mahkamah Tinggi yang lain (lihat ms 46E). Di dalam kes ini, kilanan pemohon sebenarnya adalah terhadap penghakiman itu sendiri dan bukan terhadap mana-mana parti. Mahkamah mempunyai kekebalan kehakiman yang mesti dihormati dan jika tuntutan pemohon adalah untuk ganti rugi untuk fitnah, secara nyata ia bukan sahaja
H tidak boleh diterima tetapi tuntutan seperti itu tidak boleh dibuat dengan mencelah tindakan itu yang mana mahkamah dan/atau hakim tindakan yang bijaksana itu bukan satu parti kepada tindakan itu. Selanjutnya, tuntutan seperti itu tidak boleh diterima kerana kekebalan yang diberikan kepada hakim yang bijaksana oleh s 14(1) Akta
I Mahkamah Kehakiman 1964 (lihat ms 46I dan 47A).]

Notes

For cases on intervention in a proceeding, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3278–3295.

Cases referred to

Arab Malaysian Finance Bhd v Badiaddin bin Mohd Mahidin & Anor [1996] 3 MLJ 621 (refd)
Gula Perak Bhd v Varghese Mathai [1988] 3 MLJ 358 (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] MLJ 143 (refd)
Pegang Mining Co Ltd v Choong Nam & Ors [1969] 2 MLJ 52 (refd)
Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat Anor [1993] 2 MLJ 469 (refd)
Soo Hong and Leong Kew Moi & Ors v United Malayan Banking Corp Bhd & Anor [1997] 1 MLJ 690 (refd)
Tohtonku Sdn Bhd v Superace (M) Sdn Bhd [1992] 2 MLJ 63 (refd)
United Asian Bank Bhd v Personal Representative of Roshammah (deed) & Ors [1994] 3 MLJ 327 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 14(1)
Rules of High Court 1980 O 15 r 6(2), (3)

Tai Choi Yu (*Tai Choi Yu & Co*) for the applicant.
Arthur CA Lee (*Tai Choi Yu & Co*) for the plaintiff.
JC Fong (State Attorney General's Chambers) for the first defendant.
Tan Thiam Teck (*Reddi & Co*) for the second defendant.

Cur Adv Vult

Elizabeth Chapman JC: The applicant applies by summons-in-chambers for leave to intervene and/or to be added as a plaintiff to this suit. The application is made pursuant to O 15 r 6(2) and (3) of the Rules of High Court 1980 and is supported by the affidavit of the applicant. The grounds advanced by the applicant in his application for intervention are, inter alia, that:

(1) the judgment in this suit contained and/or included many remarks and/or accusations and/or innuendoes which are defamatory of the applicant;

(2) the aforesaid remarks and/or accusations and/or innuendoes are defamatory of the applicant both in his personal and professional capacity as a qualified and competent lawyer;

(3) the aforesaid remarks and/or accusations and/or innuendoes are not justified; and

(4) the applicant is directly interested and/or affected by the said judgment both as a person and as a professional lawyer and this intervention is necessary for the applicant to seek redress and restitution.

It is not disputed that the learned judge in this case had delivered a final judgment after a full trial on 9 October 1997 and that the plaintiff has lodged an appeal against the judgment to the Court of Appeal and the

same is pending hearing. It is also on record that the applicant, an advocate and a shareholder/director of the plaintiff company, appeared at the trial of this suit as a witness for the plaintiff. His evidence was considered by the learned trial judge in his judgment.

The issue before this court is whether under O 15 r 6(2) of the Rules of High Court 1980 the applicant could still intervene for the reasons set out in his application.

Order 15 rule 6(2) states:

> (2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application — ...
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> (b) order any of the following persons to be added as a party, namely —
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> (i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
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> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;
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> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

Rule 6(2) is pertinent. An order under this rule can only be made before judgment whereas in this case we have a situation where the plaintiff's action against both defendants in this suit has been adjudicated upon, the action has been dismissed with costs. There does not exist any question or issue arising out of or relating to or connected with any relief or remedy claimed in the suit which remains to be determined between the applicant and the defendants.

In *Gula Perak Bhd v Varghese Mathai* [1988] 3 MLJ 358, the court in dismissing an application by the applicant to be added as a party to that proceeding held that (at p 358):

> (a) for there to be jurisdiction to add [the applicant] as a party, it has to be established that there is a question or issue to be tried as between [the applicant] and one of the existing parties in the petition, and that the question or issue arises out of or relates to or is connected with any relief or remedy claimed in the petition. The court further has to be satisfied that it would be just and convenient for the question or issue to be determined as between the intervener and that party and between the existing parties to the petition.

From the applicant's supporting affidavit, there is no claim by the applicant for relief against any of the parties to this suit; he has moreover, not shown how his rights against or liabilities to any party in the action in respect of the subject matter of the action be directly affected by the judgment given in this action. The applicant did not rely on his status as a shareholder and

director of the plaintiff to intervene in the action. From the grounds in the summons-in-chambers, he says he is 'directly interested and/or affected by the said judgment both as a person and as a professional lawyer ...' . He was not therefore affected or interested in a personal or professional capacity in respect of the subject matter of the action. See *Pegang Mining Co Ltd v Choong Nam & Ors* [1969] 2 MLJ 52 where the Privy Council formulated 'the *Pegang* test' to determine whether a party's interests in the matter are 'legal' or merely 'commercial' in the following words (at p 56B):

> ... A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

The *Pegang* test was adopted in *Soo Hong and Leong Kew Moi & Ors v United Malayan Banking Corp Bhd & Anor* [1997] 1 MLJ 690 by the Court of Appeal and by the Supreme Court in *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63.

The application to intervene is made after the judgment was delivered. The final order has been perfected and extracted. The court is functus officio once judgment on the merits of the case had been pronounced and the order perfected: see *Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat Anor* [1993] 2 MLJ 469. It is settled law that one High Court cannot set aside a final order of another High Court. The court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up: see *Hock Hua Bank Bhd v Sahari bin Murid* [1981] MLJ 143; *Arab Malaysian Finance Bhd v Badiaddin bin Mohd Mahidin & Anor* [1996] 3 MLJ 621.

It is stated in *United Asian Bank Bhd v Personal Representative of Roshammah (deed) & Ors* [1994] 3 MLJ 327 at p 335 that:

> Intervention to be legitimate must qualify with the conditions prescribed by O 15 r 6(2)(b)(i) or (ii) of the Rules of the High Court 1980.
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> It may be permitted at any stage of the proceedings. This means it must be applied for before the final order is made, not after it has been perfected and extracted. Secondly, a person can only be regarded as a proper party if his presence before the court is imperative for the adjudication. In a general sense, what this means is that the intervener must have a direct legal or financial interest in the action.

From the first three grounds stated in the summons-in-chambers, the applicant's complaint is about the remarks and/or accusations and/or innuendoes in the judgment which were defamatory of him both in his 'personal and professional capacity as a qualified and competent lawyer'. His real grievance is against the judgment itself and not against any of the parties hereto who did not write the judgment. As submitted on behalf of the first defendant, implicit in this effort to seek redress is for the court to withdraw or strike out such remarks from the judgment for how else could the applicant seek redress and restitution; the court has judicial immunity which must be respected and if the applicant's claim is for damages for defamation, obviously it is not only unsustainable but such a claim could

A not be made by intervening in this suit wherein the court and/or the learned trial judge is not even a party to this action. Further, such a claim would be unsustainable because of the immunity conferred on the learned judge by s 14(1) of the Courts of Judicature Act 1964. With this, I fully agree.

B In the circumstances, this application is misconceived and is accordingly dismissed with costs.

Application dismissed with costs.

Reported by Zahid Taib

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